

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

FILED

UNITED STATES OF AMERICA,

JUN 10 2005

Plaintiff,

U.S. DISTRICT COURT

v.

CRIMINAL ACTION NO. 1:98CR32

OJI PRIDE,

Defendant.

MEMORANDUM OPINION AND ORDER
DENYING MOTION FOR REDUCTION OF SENTENCE

On March 5, 1999, the defendant, Oji Pride ["Pride"], was sentenced to 97 months incarceration for aiding and abetting the distribution of crack cocaine in violation of 21 U.S.C. §841(b)(1)(C). Pride did not appeal his sentence or file a §2255 motion.

On September 21, 2004, Pride filed a Motion to Reduce Erroneous Sentence Pursuant to 18 U.S.C. §3582(c)(2) and Rule 36 in which he requests that the Court give retroactive effect to Amendment 640 which revised U.S.S.G. §2D1.1(a).¹

Pride asserts that pursuant to 18 U.S.C. §3553(a), the Court

¹U.S.S.G. §2D1.1(a)(3), as amended provides: (a) Base offense level (apply the greater); (3) "the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if the defendant receives an adjustment under § 3B1.2 (Mitigating Role), the base offense level under this subsection shall be not more than level 30."

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should consider the nature and circumstances of the offense and his history and characteristics. Pride states he is 26 years old, has one child, has rehabilitated himself, has converted to the Islam faith, has conquered his drug habit, and has earned his GED. He further asserts that "a combined influence of socio-economic circumstances promoted his crime." According to Pride, a sentence of 97 months is not warranted based on the facts of his case and Blakely v. Washington.²

Pursuant to 18 U.S.C. §3582(c)(2), the court may not modify a term of imprisonment once it has been imposed except that-

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing

²Blakely v. Washington, ____ U.S. ____, 124 S.Ct. 2531 (2004) as an extension of Apprendi v. New Jersey, 530 U.S. 466 (2000), holds that "when a judge inflicts punishment that the jury verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." Blakely, ____ U.S. ____, 124 S.Ct. at 2537 (citations omitted).

The Supreme Court has held that Blakely applies to federal sentencing guidelines. United States v. Booker, ____ U.S. ____, 125 S.Ct. 738 (2005). In Booker the Supreme Court issued a two part decision. In the first part, the Supreme Court held that the mandatory sentencing guidelines violated a defendant's Sixth Amendment right to a jury trial because a judge, not a jury, determines facts which could increase the defendant's sentence beyond the sentence which could be imposed based on jury fact finding. In the second part of the decision, the Supreme Court severed the unconstitutional provisions from the Sentence Reform Act and made the guidelines advisory and established an unreasonableness standard of review for sentences on appeal.

Pride's Blakely claim will be referred to as a Booker claim in this Order.

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Commission pursuant to 28 U.S.C. 994(o), upon the motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.³

See also United States v. Legree, 205 F.3d 724 (4th Cir. 2000), cert. denied 531 U.S. 1080 (2001).

³According to 18 U.S.C. § 3553(a) the statute, a court shall consider:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
 - (2) the need for the sentence imposed--
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant;
- and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
 - (3) the kinds of sentences available;
 - (4) the kinds of sentence and the sentencing range established
- for--
- (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;
 - (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;
 - (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
 - (7) the need to provide restitution to any victims of the offense.

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Section 3852(c)(2) applies only to amendments that the Sentencing Commission has indicated apply retroactively and has listed in U.S.S.G. §1B1.10(c). United States v. Drath, 89 F.3d 216 (5th Cir.1996). If an amendment is not listed in U.S.S.G. §1B1.10(c), the retroactive application of such amendment is not authorized. U.S.S.G. §1B1.10(a); Drath 89 F. 3d at 218. U.S.S.G. §1B1.10 provides Amendment 640 is not a retroactive amendment. Thus, Pride is not entitled to retroactive application of Amendment 640.

Moreover, while Pride is attempting to raise a Booker claim, he does not explain how his sentence violates Booker. Further, the Fourth Circuit Court of Appeals has not ruled on the retroactivity of Booker. However, other circuits have held that Booker does not apply retroactively. See Varela v. United States, 400 F. 3d 864 (11th Cir. 2005); United States v. Price, 400 F. 3d 844 (10th Cir. 2005); McReynolds v. United States, 397 F. 3d 479 (7th Cir. 2005); Humphress v. United States, 398 F. 3d 855 (6th Cir. 2005); Lloyd v. United States, 407 F. 3d 608 (3d Cir. 2005); Guzman v. United States, 404 F. 3d 139 (2d Cir. 2005). Thus, in accordance with these decisions, the Court finds that Pride is not entitled to have Booker applied retroactively to his sentence.

Lastly, Pride is not entitled to relief under Rule 36 of the

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Federal Rules of Criminal Procedure. Rule 36 provides as follows:

After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.

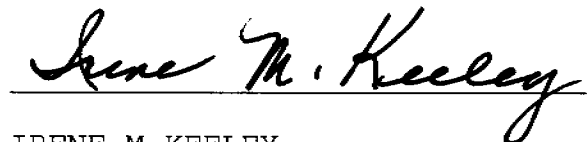
There has been no clerical error or oversight or omission in this case. Thus, Pride is not entitled to a change in his judgment and commitment order.

Consequently, Pride's motion for reduction of sentence is DENIED.

IT IS SO ORDERED.

The Clerk is DIRECTED to mail a copy of this order to Pride and the United States Attorney for the Northern District of West Virginia.

DATED: June 10, 2005



IRENE M. KEELEY

UNITED STATES DISTRICT JUDGE